Supreme Court, U.S.
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No. 10-_____

IN THE

Supreme Court of the United States

Thomas Lewis Turner, II,

Petitioner,

v.

State of Tennessee.

On Petition for a Writ of Certiorari
to the Tennessee Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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April 23, 2010

QUESTION PRESENTED

Whether a criminal suspect's request for a telephone to contact an attorney constitutes an unequivocal request for counsel, as guaranteed by the Fifth Amendment to the United States Constitution.

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STATUTE

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Thomas Lewis Turner, II, respectfully petitions for a writ of certiorari to review the judgment of the Tennessee Supreme Court in this case.

OPINIONS BELOW AND JURISDICTION

The opinions of the trial court and Tennessee Court of Criminal Appeals are not reported. The opinion of the Tennessee Supreme Court will be reported. *Tennessee v. Turner*, No. M2008-00482-SC-R11-CO, --S.W.3d --, 2010 WL 987076 (Tenn. 2010).

Petitioner first raised the issue of his Fifth Amendment to the United States Constitution right to counsel in the trial court by filing a pre-trial Motion to Suppress his statement made to the Smyrna, Tennessee, Police Department. After the grant of the Motion, the State of Tennessee appealed that decision to the Tennessee Court of Criminal Appeals by way of interlocutory appeal, where the sole issue before that court was the suppression issue. The intermediate court of appeals reversed the trial court's decision, which reversal was affirmed by the Tennessee Supreme Court by an Opinion entered on March 19, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

STATEMENT

1. A suspect "must articulate his desire to have counsel present sufficiently clearly that a reasonable officer in the circumstances would understand the statement to be a request for any attorney." *Davis v. United States*, 512 U.S. 452, 459 (1994).

2. On appeal to the Tennessee Supreme Court, that court found that Petitioner's request for his cellular telephone for the purpose of contacting an attorney did not

rise to the level of a request for counsel. *Turner*, 2010 WL 987076, at *11. Petitioner argued to the court that Petitioner's statement to the Smyrna, Tennessee, police department should be suppressed pursuant to this Court's *Miranda* dictates because it was a clear, unequivocal request for counsel.

The exchange at issue was, as follows:

Det. Spearman: . . . [D]o you want a lawyer present right now? Just yes or no.

Petitioner: I could-if I could afford one.

Det. Hodges: It's not up to whether you afford one or not-

Petitioner: Oh, I can get one rather or not?

Det. Hodges: Yes, sir.

Petitioner: And he can come today?

Spearman: If you got one that you can call.

Petitioner: Can I-my phone, my phone is right there in that little envelope-can you go get it for me?

Det. Hodges: Well, I tell you what-we've gotta phone that you can use if you want.

Petitioner: I mean, the number's in my cell phone, the lawyer.

Turner, 2010 WL 987076, at *10.

The Tennessee Supreme Court acknowledged that whether Petitioner's statements rose to the level of a Miranda request for counsel was a "close issue," but ultimately determined that Petitioner had not invoked his right to counsel. *Id.* The Court went on to state that its decision should "not be read to adopt an inflexible rule that a request to call an attorney or a statement regarding one's ability to afford counsel can never be deemed an unequivocal request for counsel." *Id.* at 11.

REASONS FOR GRANTING THE WRIT

1. The question presented is in conflict with multiple federal court opinions. As can be seen, Petitioner's contention is that a request for a telephone for the express purpose of contacting counsel is a request for counsel, protected by the Fifth Amendment to the United States Constitution.

In *Robinson v. Borg*, the United States Court of Appeals for the Ninth Circuit held that the following statement constituted a reasonable request for an attorney: "I have to get me a good lawyer, man. Can I make a phone call?" 918 F.2d 1387, 1391 (9th Cir. 1990). Similarly, the United States District Court for the District of Vermont held that a request was unequivocal based on the following statement to an officer: "Yeah, let's do that. Well, when we get down to the office, can we call-use your phone to call an attorney?" *United States v. Taft*, 769 F.Supp. 1295, 1303 (D. Vt. 1991). The United States District Court for the

Southern District of New York also found that a criminal defendant had invoked his Fifth Amendment right to counsel by requesting to telephone his lawyer. *Kirby v. Senkowski*, 141 F.Supp.2d 383, 396-97 (S.D.N.Y. 2001).

In a less similar, albeit instructive, case, the United States Court of Appeals for the First Circuit held that a criminal defendant's making of two calls, (1) to information to get his lawyer's number and (2) to his lawyer's office, in the presence of a detective constituted an exercise of his right to counsel. *United States v. Porter*, 764 F.2d 1, 6-7 (1st Cir. 1985).

At least two other federal circuit courts have found that a request to call an attorney did not rise to the level of a *Miranda*-protected invocation of the right to counsel. See *Ford v. Hall*, 546 F.3d 1326, 1339 (11th Cir. 2008)(holding that the defendant's inquiry whether he could "call his attorney" did not invoke his right to counsel); *Dormire v. Wilkinson*, 249 F.3d 801, 805 (8th Cir. 2001)(holding that the defendant's statement, "Could I call my lawyer?", did not invoke the his right to counsel).

2. This Court's intervention is required to resolve the intractable conflict between the multiple federal decisions and the Tennessee Supreme Court's decision, which apparently aligns with the decisions of the Eighth and Eleventh Circuits.

3. Certiorari is also warranted because the continued erosion of the Fifth Amendment, *Miranda* and its progeny has rendered the Fifth Amendment right to counsel a "magic words" right, such that anything other

than a suspect's statement of "I want a lawyer" is the only statement that will invoke the right. Recognizing *Davis*'s instruction that the invocation of the right is analyzed from a reasonable officer perspective, this issue is heightened in this matter by simply asking: "How could an officer determine that Petitioner asking for his telephone, with his attorney's number it, be something other than an invocation of the right to counsel?"

Additionally, the resolution of this conflict is necessary because oftentimes a criminal suspect's statement to law enforcement will be outcome determinative, such that admission or suppression of the statement will resolve the case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE SUPREME COURT OF TENNESSEE AT JACKSON

November 5, 2009 Session

STATE OF TENNESSEE v. THOMAS L. TURNER, II

Appeal by Permission from the Court of Criminal Appeals
Circuit Court for Rutherford County
No. F-60192B Don R. Ash, Judge
No. M2008-00482-SC-R11-CO - Filed March 19, 2010

During the course of an investigation for a robbery and homicide, officers provided Miranda warnings to the defendant, who sought clarification regarding his right to the presence of counsel. Ultimately, the defendant executed a waiver and made a statement to police. Indicted later for first degree murder and other offenses, the defendant filed a motion to suppress his entire statement, arguing that the investigating officers had failed to honor an unequivocal invocation of his right to counsel. The trial court granted the motion, the State received permission to take an interlocutory appeal, and the Court of Criminal Appeals reversed. We accepted the application for review to determine whether the defendant was equivocal in his request for counsel and, if so, whether the police properly limited further questions to the clarification of his right to counsel until the right was either clearly invoked or waived. Because the defendant did not clearly assert his right and the police officers limited the scope of their questions until the defendant chose to execute the

waiver of rights form, the judgment of the Court of Criminal Appeals is affirmed.

Tenn. R. App. P. 11; Judgment of the Court of Criminal Appeals Affirmed

GARY R. WADE, J., delivered the opinion of the Court, in which JANICE M. HOLDER, C.J., CORNELIA A. CLARK, WILLIAM C. KOCH, JR., and SHARON G. LEE, JJ., joined.

Kerry Knox, Murfreesboro, Tennessee, for the appellant, Thomas L. Turner, II.

Robert E. Cooper, Jr., Attorney General & Reporter; Michael E. Moore, Solicitor General; Mark A. Fulks, Senior Counsel; William C. Whitesell, Jr., District Attorney General; and J. Paul Newman, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Facts and Procedural History

On the night of February 8, 2007, Tiana Klimpel was shot and killed outside of her apartment building in Smyrna. At approximately 9:00 a.m. on the following day, Thomas L. Turner, II (the "Defendant") and his co-defendant, Kelando Starnes, were arrested by Smyrna police. Within three hours, Detective Kevin Hodges and Lieutenant Todd Spearman began questioning the Defendant in a small room at the police department. The video recording of the interview, which is a part of the record, establishes that the police officers were seated on one side of a small table while the Defendant was seated on the other side with his back

to the closed entrance door.[1] Detective Hodges and Lieutenant Spearman wore identical wind shirts with "Smyrna Police" printed on the front. Detective Hodges asked the Defendant if he wanted anything to drink, and when he stepped out of the room to get a soft drink for the Defendant, the following exchange occurred between the Defendant and Lieutenant Spearman:

> THE DEFENDANT: Are you my lawyer?
> SPEARMAN: No, sir, I'm a police officer.
> THE DEFENDANT: I . . . can get a lawyer, right?
> SPEARMAN: That's your option.

Detective Hodges returned to the room within two minutes and read the Defendant his Miranda rights.[2] Afterward, the following discussion took place:

> HODGES: You understand all those?
> THE DEFENDANT: Yes.
> HODGES: Okay. Are you willing to sit down with us and talk about what happened last night?
> THE DEFENDANT: Yeah, I . . . can talk to you.
> HODGES: Okay.

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[1] The excerpts from the interview transcribed herein are based upon our independent review of the video recording.

[2] See Miranda v. Arizona, 384 U.S. 436, 444-45 (1966).

About fifteen seconds later, after Lieutenant Spearman had asked the Defendant about his educational level, another exchange occurred:

> HODGES: Alright, so you agree with all that, and you're willing to talk to us? The excerpts from the interview transcribed herein are based upon our independent review of the video recording.
>
> THE DEFENDANT: Yeah, I could talk–
> HODGES: Okay.
> THE DEFENDANT: But . . . anything I say can be held against me, right?
> HODGES: Yes, sir, that's one of your rights.
> THE DEFENDANT: Um, how quick will my lawyer get here?
> HODGES: Well, that's . . . up to you. If you wish to speak with an attorney then we're not going to ask you any questions, okay?
> THE DEFENDANT: If, uhh–
> SPEARMAN: Now that's your option.
> HODGES: Yeah, that's your option.
> SPEARMAN: That's something that . . . you know, once you do request that we won't speak anymore, so–
> THE DEFENDANT: I'm talking about . . . will my lawyer be here today?
> SPEARMAN AND HODGES: Have you called one?

THE DEFENDANT: I ain't even got a phone call yet.
HODGES: Okay.
THE DEFENDANT: I mean, to be honest, this is my first time, I mean, I'm on probation already. I never did anything. I've never been in trouble a day of my life. . . .

. . . .

HODGES: Well, I mean, these are . . . your rights. You're the one that has to say whether you want to talk to an attorney or not.
THE DEFENDANT: Let's hear them. What kind of questions do you have?
HODGES: Okay. Well . . . you're agreeing that you do want to speak with us now without someone present, without a lawyer present, right?
THE DEFENDANT: Correct.
HODGES: Okay.
THE DEFENDANT: I mean, then–I can stop at any time–
SPEARMAN: At any time you want.
THE DEFENDANT: –and get my lawyer.
SPEARMAN: Yes, at any time that you want to.
HODGES: Yes, you sure can.
THE DEFENDANT: Because really I don't know the system, you know, so I–
SPEARMAN: Let me–I'll make it a little bit more simple for you. We wish to ask you questions, okay? We wish to

ask you questions about some stuff that happened. According to this, you have a right to a lawyer present, okay? That's your option. You know, do you want a lawyer present right now? Just yes or no.
THE DEFENDANT: I could–if I could afford one.
HODGES: It's not up to whether you afford one or not–
THE DEFENDANT: Oh, I can get one rather or not?
HODGES: Yes, sir.
THE DEFENDANT: And he can come today?
SPEARMAN: If you got one that you can call.
THE DEFENDANT: Can I–my phone, my phone is right there in that little envelope–can you go get it for me?[3]
HODGES: Well, I tell you what–we've got a phone that you can use if you want.
THE DEFENDANT: I mean, the number's in my cell phone, the lawyer.
HODGES: Okay, so you already have an attorney then?
THE DEFENDANT: Yeah.
SPEARMAN: Who's your attorney?

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[3] The video recording shows that Lieutenant Spearman, who had a notebook open in front of him on the table, closed the notebook after the Defendant asked this question.

The Defendant explained that his cell phone contained the phone number of a lawyer from a pre-paid legal service, which he had previously obtained in anticipation of court proceedings in an unrelated matter. The officers and the Defendant then engaged in further conversation:

> HODGES: Okay. Basically . . . what you're telling me is that you really don't want to talk to us right now and you would rather speak to an attorney?
> THE DEFENDANT: I mean, I could talk, 'cause I could tell you–
> HODGES: Well, I don't want to force you to do anything that you don't want to do, okay? I'm not here to do that.
> THE DEFENDANT: I just wanted to hear what you had to say.
> HODGES: Well, I mean, it's one of th[ose] two way streets. Either you want to talk to me and we'll sit down and talk, or you don't.
> SPEARMAN: Or you want an attorney. It's that simple.
> HODGES: It's . . . that simple.
> THE DEFENDANT: All right, I'll talk to you.
> HODGES: Okay. All right then, what I need you to do, okay, and you can read these if you wish–
> THE DEFENDANT: And I can stop at any time, right?
> HODGES: Yes, sir.
> THE DEFENDANT: And get my lawyer?

HODGES: Yes, sir.

Afterward, Detective Hodges explained the purpose and content of the Miranda waiver form. The Defendant read the form silently and, after initialing it, submitted to the interrogation.[4] The Defendant subsequently made a number of incriminating statements that led to his eventual indictment for his role in the murder and robbery of Klimpel.

At 1:26 p.m., after being questioned for nearly an hour-and-a-half, the Defendant slammed his hand down on the table and stated unequivocally that he wanted to speak to an attorney:

> THE DEFENDANT: I'll tell you what. Get me a lawyer, and–and I'm through. Get me a lawyer, and I'll tell the lawyer exactly everything that went down. I had nothing to do with it. I can't afford one, I need a lawyer. Cause this is getting out of hand, I'm telling you man.
> HODGES: I understand.
> THE DEFENDANT: Real talk, man.
> HODGES: Cool.
> THE DEFENDANT: I–it wasn't me.

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[4] The Miranda waiver form, which was entered into evidence at the suppression hearing, indicates that the Defendant waived his rights by signing the form at 12:05 p.m. on February 9, 2007.

> HODGES: Okay. All right, then. All right. That's cool.
> THE DEFENDANT: I want to go home today.
> HODGES: Hey, hey, hey. You've already–you've already asked for an attorney, okay? So do me a favor, and don't say anything else, all right?

At that point, Detective Hodges, who by then was alone in the room with the Defendant, ended the interview.

On May 8, 2007, some three months after the arrest, both the Defendant and a codefendant were indicted on charges of conspiracy to commit robbery, especially aggravated robbery, first degree felony murder, first degree premeditated murder, possession of ecstasy with intent to deliver or sell, and possession of marijuana with the intent to deliver or sell. Afterward, the Defendant filed a motion to suppress his entire statement to the police, contending that because "[he] had little sleep, had been under the influence of drugs, and had been in custody for some time," the statements were the result of coercion. Later, he amended the motion on "the basis that he [had] unequivocally, unconditionally requested counsel prior to" the interrogation and, therefore, his statements were inadmissible as evidence.

Both Detective Hodges and Lieutenant Spearman appeared as witnesses at the hearing on the motion to suppress. The Defendant did not testify. Detective Hodges testified that, in his opinion, the Defendant, after considering his options,

knowingly and voluntarily waived his right to counsel before making a statement to police. He stated that the Defendant "appeared fine" during the interview and understood "that if he had any questions about any of his rights that we would explain those to him [and] . . . he could stop answering at any time." While Detective Hodges acknowledged that the Defendant had initially claimed that "he had an attorney," the Defendant immediately explained, "Actually I've got prepaid legal service." Detective Hodges also recalled that the Defendant asked for his cell phone at one point in order to find his legal services number. Detective Hodges insisted that the Defendant did not make an unequivocal request for an attorney until after they "had been in the interview for over an hour," and that when the Defendant did so, the interview was ended.

Lieutenant Spearman testified that he had been trained to stop an interrogation whenever he heard an unequivocal request for an attorney. Like Detective Hodges, he did not believe that the Defendant expressed an unambiguous desire for counsel until nearly an hour-and-a-half into the interview. According to Lieutenant Spearman, the Defendant did not seem to be under the influence of drugs or alcohol, nor was he coerced to provide answers during the course of the interrogation.

While specifically accrediting the officers' testimony as to the Defendant's mental state at the time of the interview and observing that the Defendant's custodial statements should not be suppressed on grounds "of coercion, intoxication, or lack of sleep," the trial court nevertheless granted

the motion to suppress, concluding that the contents of the video recording established that the police continued the interrogation after "an unequivocal request for an attorney." The order provides, in part, as follows:

> [N]ot all of the statements are unequivocal requests for an attorney. For instance, questions regarding whether the detective is his attorney, how quick it will take his attorney to arrive, whether his attorney will arrive today, whether he can get an attorney without money, and whether he needs an attorney are all ambiguous requests. However, this Court is of the belief when the Defendant asked the detectives to retrieve his cell phone so he could call his attorney, he was making an unequivocal request for an attorney. This statement, coupled with the entire surrounding circumstances and prior [al]luding to an attorney support this Court's finding the Defendant's statement to the Smyrna Police should be suppressed to the extent the Detectives continued questioning the Defendant after he asked to retrieve his attorney's phone number.

(Emphasis added.) Afterward, the trial court granted the State's request for an interlocutory appeal pursuant to Rule 9 of the Tennessee Rules of Appellate Procedure. The Court of Criminal Appeals reversed the order of suppression, holding that the

Defendant had failed to make an unequivocal request for counsel at the outset of the interview, and ruling, therefore, that his subsequent statements could be admitted into evidence. State v. Turner, No. M2008-00482-CCA-R9-CO, 2009 WL 426260 (Tenn. Crim. App. Feb. 20, 2009). We granted the Defendant's application for permission to appeal in order to address whether his reference to counsel qualified as equivocal or unequivocal and to clarify the rules applicable to these specific circumstances.

Standard of Review

When considering an appeal from a trial court's ruling on a motion to suppress, the trial court's findings of fact in the suppression hearing should be upheld unless the evidence preponderates to the contrary. State v. Hanning, 296 S.W.3d 44, 48 (Tenn. 2009). Generally, "[q]uestions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact." State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996). "But when a court's findings of fact at a suppression hearing are based solely on evidence that does not involve issues of credibility, such as . . . videotape evidence . . . , the rationale underlying a more deferential standard of review is not implicated." State v. Binette, 33 S.W.3d 215, 217 (Tenn. 2000)(analogizing the review of videotape evidence to the review of medical testimony that is given by deposition in workers' compensation cases). "In such circumstances, a trial court's findings of fact are subject to de novo appellate review." State v. Payne, 149 S.W.3d 20, 25 (Tenn. 2004). Here, because the trial court explicitly based its decision to grant the motion to suppress on its review of the video

recording of the interrogation, which is equally available on appellate review, the Binette standard applies. See 33 S.W.3d at 217. Of course, our scope of review on questions of law is de novo, Hanning, 296 S.W.3d at 48, and "[t]he application of the law to the facts . . . is a question of law." State v. Turner, 297 S.W.3d 155, 160 (Tenn. 2009).

Our Court of Criminal Appeals has often held that whether an individual's request for counsel was equivocal or unequivocal is a question of fact. State v. Farmer, 927 S.W.2d 582, 594 (Tenn. Crim. App. 1996); see also State v. Berry, 141 S.W.3d 549, 576 (Tenn. 2004); State v. Nash, No. E2008-00951-CCA-R3-CD, 2009 WL 2461178, at *4 (Tenn. Crim. App. Aug. 12, 2009); State v. Osborne, No. M2005-02926-CCA-R3-CD, 2007 WL 1890176, at *8 (Tenn. Crim. App. June 29, 2007). In practice, however, our intermediate appellate court has more properly considered the issue as a mixed question of law and fact and has not afforded deference to the rulings of trial courts. This is consistent with the approach taken in other jurisdictions. In fact, we were unable to find any reported decisions from appellate courts outside of this state that have reviewed the nature of a request for counsel as purely a question of fact. See, e.g., People v. Porter, 878 N.E.2d 998, 999 (N.Y. 2007); State v. Dumas, 750 A.2d 420, 425 (R.I. 2000); Commonwealth v. Redmond, 568 S.E.2d 695, 697-98 (Va. 2002). Nevertheless, whether the trial court's determination is a question of fact or a mixed question of law and fact does not affect our standard of review in this instance. As stated, because the trial court's determination was based upon the same video evidence in this record, our review is de novo.

Background

The Fifth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, provides individuals with the right to have counsel present during a custodial interrogation.[5] The Supreme Court has defined

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[5] In contrast,

[t]he Sixth Amendment to the United States Constitution guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. Const. amend VI. A defendant has the right to counsel at all "'critical' stages in the criminal justice process 'where the results might well settle the accused's fate and reduce the trial itself to a mere formality.'" Maine v. Moulton, 474 U.S. 159, 170 (1985) (quoting United States v. Wade, 388 U.S. 218, 224 (1967)).

The United States Supreme Court has long held that "the [Sixth Amendment] right to counsel attaches only at or after the initiation of adversary proceedings against the defendant . . . . '[W]hether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" United States v. Gouveia, 467 U.S. 180, 187-88 (1984)(quoting Kirby v. Illinois, 406 U.S. 682, 688-89 (1972)). This interpretation achieves the underlying purposes of the Sixth Amendment:

> That interpretation of the Sixth Amendment right to counsel is consistent not only with the literal language of the Amendment, which requires the existence of both a "criminal [prosecution]" and an "accused," but also with the purposes which we have recognized that the right to counsel serves . . . . The "core purpose"

"custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Miranda, 384 U.S. at 444; see also Malloy v. Hogan, 378 U.S. 1, 6 (1964) (holding that the Fifth Amendment's protection against self-incrimination is applicable to the states through the Fourteenth Amendment). Article I, section 9 of the Tennessee Constitution, which provides "[t]hat in all criminal prosecutions, the accused . . . shall not be compelled to give evidence against himself," also encompasses the right to counsel "during police-initiated custodial interrogation." State v. Saylor, 117 S.W.3d 239, 244 (Tenn. 2003). Police must inform an individual of his right to counsel prior to custodial interrogation.

> of the counsel guarantee is to assure aid at trial, "when the accused [is] confronted with both the intricacies of the law and the advocacy of the public prosecutor." United States v. Ash, 413 U.S. 300, 309 (1973)[; see also] Johnson v. Zerbst, 304 U.S. 458, 462-463 (1938). . . .

Id. at 188-89.

State v. McWhorter, No. M2004-02804-CCA-R3-CD, 2005 WL 3332755, at *6 (Tenn. Crim. App. Dec. 6, 2005). In Tennessee, the Sixth Amendment right to counsel attaches with the initiation of criminal charges through an arrest warrant, a preliminary hearing (if no arrest warrant is issued), or an indictment or presentment (when the charge is initiated by the grand jury). State v. Mitchell, 593 S.W .2d 280, 286 (Tenn. 1980).

Miranda, 384 U.S. at 444-45. The individual may affirmatively waive the right to counsel, but if at any point during questioning he asserts the right, all questioning must cease until an attorney is present or the accused himself initiates further communication with the police. Edwards v. Arizona, 451 U.S. 477, 484-85 (1981); Saylor, 117 S.W.3d at 244; State v. Stephenson, 878 S.W.2d 530, 547-48 (Tenn. 1994). Any "fruits" of a custodial interrogation conducted absent informing an individual of his Miranda rights, or any information acquired in a police interview after the individual affirmatively invokes his right to counsel, must be suppressed. See Edwards, 451 U.S. at 485.[6]

While Miranda and Edwards set forth a bright-line rule with regard to invocation of the right to counsel, subjects of an interrogation do not always clearly and unambiguously assert that right. The question of precisely what constitutes the invocation of counsel has often been the subject of litigation, and was specifically addressed by the Supreme Court in Davis v. United States, 512 U.S. 452 (1994). Davis, a member of the United States Navy, was questioned after a fellow sailor with whom he had a dispute over a game of pool was found beaten to death with a pool cue. Id. at 454. About an hour-and-a-half into the

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[6] The Supreme Court recently held that a break in the custodial interrogation of fourteen days is sufficient to end the Edwards presumption that any statements made by the individual after invoking his right to counsel must be suppressed. Maryland v. Shatzer, 130 S.Ct. 1213, ____, 2010 WL 624042, at *8 (Feb. 24, 2010).

interview, Davis, who had already signed a waiver of his right to counsel under military law, remarked: "Maybe I should talk to a lawyer." Id. at 455. The interviewing agents attempted to clarify whether Davis was asking for a lawyer at that point, but continued the interview when he responded in the negative. Id. An hour later, after incriminating himself with certain of his answers, Davis said, "I think I want a lawyer before I say anything else," and the interview was ended. Id. Davis sought to suppress the statements made subsequent to his initial reference to an attorney. Id. at 455.

Writing on behalf of the majority, Justice Sandra Day O'Connor reaffirmed the "'"rigid" prophylactic rule' of *Edwards*" which mandates the cessation of a police interrogation upon an unequivocal request for an attorney, but observed that the rule necessarily "requires courts to 'determine whether the accused *actually invoked* his right to counsel.'" Id. at 458 (quoting Smith v. Illinois, 469 U.S. 91, 95 (1984)). The opinion further provides that

> if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning.
>
> . . . . Although a suspect need not "speak with the discrimination of an Oxford don," he must articulate his

> desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. If the statement fails to meet the requisite level of clarity, *Edwards* does not require that the officers stop questioning the suspect.

Id. at 459 (internal citations omitted) (second emphasis added). Thus, under Davis, a court considering whether an interrogation suspect invoked his Fifth Amendment right to counsel after having executed a Miranda rights waiver must make an objective inquiry as to whether a reasonable officer, in light of the circumstances, would have known that the suspect was clearly and unambiguously asserting that right.

Although we have intimated that the right to counsel under article I, section 9 of the Tennessee Constitution may, in some circumstances, be applied more broadly than the Fifth Amendment,[7] we also have held that the validity of an accused's invocation of his or her right to counsel is not one of those circumstances. Saylor, 117 S.W.3d at 246. Instead,

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[7] In State v. Smith, 834 S.W.2d 915, 918 (Tenn. 1992), in which the voluntariness of a confession was at issue, this Court observed that article I, section 9 of our state constitution may apply more broadly than its Fifth Amendment counterpart "based upon considerations other than, and in addition to, the difference in terminology."

we have applied the Davis standard, which requires a determination of whether an invocation of the right to counsel under the Fifth Amendment is unequivocal, to analyze requests for counsel under article I, section 9 of our state constitution. Id. (citing State v. Huddleston, 924 S.W.2d 666, 670 (Tenn. 1996)).

In Saylor, a suspect, after being detained at police headquarters, made a series of statements to a Johnson City police officer. Id. at 243-44. During their preliminary conversation, Saylor said, "I guess it don't matter until I can get a lawyer present." Id. at 243. At other points he remarked, "I'm supposed to have a lawyer though, don't I," "I have to have a lawyer present, I reckon," and "I might need a lawyer because somebody might try to accuse me of something I didn't do." Id. at 243-44. Afterward, he signed the form waiving his Miranda rights and confessed to the crime. Id. at 244. Applying Davis, this Court held that "[n]o reasonable police officer in these circumstances would understand Saylor's remarks to be an unequivocal request for an attorney." Id. at 246-47. Over the past several years, the Court of Criminal Appeals has faithfully applied the standard set forth in Davis and Saylor in several of its decisions.[8] We continue to use the objective

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[8] See, e.g., State v. Ragland, No. W2008-02065-CCA-R3-CD, 2009 WL 4825182, at *8 (Tenn. Crim. App. Dec. 15, 2009) (holding that request for counsel was not unequivocal when suspect wrote "I need a lawyer" on the blackboard, among several of other statements, while alone in the interview room, then responded to officer's clarifying questions that he did not want a lawyer); Nash, 2009 WL 2461178, at *4-5 (holding that suspect's question

standard to determine whether a suspect's invocation of his right to counsel was clear and unequivocal.

In Saylor, this Court did not differentiate between an ambiguous request for counsel that occurs prior to the waiver of Miranda rights and one that is made after the right to counsel is waived. In Davis, of course, the suspect's equivocal invocation of his right to counsel occurred well after he had executed a written waiver. 512 U.S. at 455. The Supreme Court "h[e]ld that, after a knowing and voluntary waiver of the *Miranda* rights, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney." Id. at 461 (emphasis added). The Court reasoned that

> [a] suspect who knowingly and voluntarily waives his right to counsel after having that right explained to him has indicated his willingness to deal with the police unassisted. Although *Edwards* provides an additional protection–if a suspect subsequently requests an attorney,

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"it ain't possible that I could have a lawyer?" "did not articulate his request for counsel with such clarity that a reasonable police officer would believe his statement to be a request for an attorney"); Osborne, 2007 WL 1890176, at *9 (holding that accused's request for counsel was equivocal when he read the statement on the Miranda waiver form "I do not want a lawyer at this time," immediately said "Yes, I do," then read the remainder of the form aloud and signed the waiver of rights).

> questioning must cease–it is one that must be affirmatively invoked by the suspect.

Id. at 460-61. The high court has also explained that "[i]nvocation [of the right to counsel] and waiver [of that right] are entirely distinct inquiries, and the two must not be blurred by merging them together." Smith, 469 U.S. at 98.

Based primarily on this language, most courts considering the pre-waiver/post-waiver distinction have held that the Davis ruling applies only to circumstances in which the accused has already waived his Miranda rights. For example, in State v. Leyva, 951 P.2d 738, 743 (Utah 1997), the Utah Supreme Court ruled that "the Court in *Davis* did not intend its holding to extend to prewaiver scenarios," and described as "entirely separate" the burdens of proof prior to the "waiver of *Miranda* rights and . . . postwaiver invocation of those rights":

> Regarding initial waiver of those rights, the United States Supreme Court has stated that "a heavy burden" rests on law enforcement officers "to demonstrate that the defendant knowingly and intelligently waived" his *Miranda* rights. . . . However, once a suspect has clearly, knowingly, and intelligently waived his *Miranda* rights, *Davis* places the requirement of clarity with respect to postwaiver invocation of those rights on the suspect.

Id. (quoting Miranda, 384 U.S. at 475). Since Leyva, every state appellate court to consider the pre-waiver and post-waiver distinction, with only one exception, has applied its reasoning or similar rationale. See State v. Collins, 937 So. 2d 86, 93 (Ala. Crim. App. 2005) (holding that Davis did not apply where the defendant's questions regarding a lawyer were asked "before she signed the waiver-of-rights form"); Noyakuk v. State, 127 P.3d 856, 869 (Alaska Ct. App. 2006) ("[T]he *Davis* rule (that interrogating officers need not interrupt their questioning to clarify the suspect's wishes) applies only to a post-*Miranda*-waiver setting."); Alvarez v. State, 15 So. 3d 738, 745 (Fla. Dist. Ct. App. 2009) ("[A]n ambiguous waiver must be clarified before initial questioning."); State v. Holloway, 760 A.2d 223, 228 (Me. 2000) (declining to extend Davis "to require an unambiguous *invocation* of . . . the right to an attorney in the absence of a prior waiver); Freeman v. State, 857 A.2d 557, 573 (Md. Ct. Spec. App. 2004) ("[A] careful reading of *Davis* reveals that the Supreme Court's bright line rule, requiring an unequivocal assertion of the right to counsel, pertains to a situation in which the defendant had previously waived his right and then, during the interrogation, arguably sought to exercise his rights."); State v. Tuttle, 650 N.W.2d 20, 28 (S.D. 2002) ("*Davis*, in sum, applies to an equivocal postwaiver invocation of rights."); but see In re Christopher K., 841 N.E.2d 945, 964-65 (Ill. 2005) (acknowledging that the holding in Davis is limited to an alleged invocation of the right to counsel in the post-waiver context, but choosing to also apply it in the pre-waiver context where the Supreme Court has "left open the issue").

More recently, two federal circuit courts of appeals have adopted the reasoning of these state courts. In United States v. Rodriguez, 518 F.3d 1072, 1078-79 (9th Cir. 2008), the Ninth Circuit held that "the 'clear statement' rule of *Davis* addresses only the scope of invocations of *Miranda* rights in a *post-waiver* context" and does "not address what the police must obtain, in the *initial waiver* context, to begin questioning."[9] A year later, a Second Circuit panel held that "*Davis* does not instruct courts how to analyze an *initial* invocation of one's Fifth Amendment rights following the *Miranda* warnings where no waiver occurred," but "only provides guidance for circumstances in which a defendant makes a claim that he *subsequently* invoked previously waived Fifth Amendment rights." United States v. Plugh, 576 F.3d 135, 142-43 (2d Cir. 2009). The panel concluded that Davis was "not in play" because the suspect had not signed the form waiving his Miranda rights. Id. at 143. Finally, at least one prominent commentator has agreed with this rationale. See, e.g., Wayne R. LaFave, et al., 2 Criminal Procedure § 6.9(g), n.185 (3d ed. Westlaw 2009) (observing that "[a]lthough the point is sometimes missed," Davis is limited to the postwaiver context).

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[9] The Ninth Circuit also observed, as we have, that "the majority of state supreme courts to consider the issue [of whether Davis is limited to the post-waiver scenario] have reached the same conclusion." Id. at 1079 n. 6. In addition, although "a number of decisions have applied the *Davis* rule in a pre-waiver or initial waiver context . . . only one published opinion, from any jurisdiction, [has done] so after expressly considering the initial waiver/post-waiver distinction." Id. (citing In re Christopher K., 841 N.E.2d at 964-65).

In our view, the ruling in Davis applies only to post-waiver requests for counsel. As the Supreme Court stated in Smith v. Illinois, the invocation of the right to counsel during the initial encounter with police is separate and distinct from an assertion of that right after a knowing and valid waiver of Miranda rights. While the state bears the burden of proving a valid waiver of the right to counsel prior to a custodial interrogation, the burden shifts after that right has been waived. Where, as here, a suspect makes an equivocal request for counsel prior to waiving Miranda rights, the police are limited to questions intended to clarify the request until the suspect either clearly invokes his right to counsel or waives it.[10] See State v. Blackburn, 766 N.W.2d 177, 182-83 (S.D. 2009) ("[I]n a in a pre-waiver situation where the accused has *not yet validly waived* the *Miranda* rights, the officers must clarify the waiver before proceeding with the interview."); see also Rodriguez, 518 F.3d at 1080 ("Prior to obtaining an unambiguous and unequivocal waiver, a duty rests with the interrogating officer to clarify any ambiguity before beginning general interrogation."); Collins, 937 So. 2d at 93 ("Because [the defendant] did not waive her *Miranda* rights before she asked the questions about obtaining a lawyer, the

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[10] Thus, attempts by officers to clarify an ambiguous request for counsel in the pre-waiver context do not, as the Court of Criminal Appeals implied, go "above and beyond what is required by Tennessee law." Turner, 2009 WL 426260, at *8. This statement of the Court of Criminal Appeals is only accurate in the post-waiver context.

ambiguity of her questions required the interrogating officer to ask follow-up questions."). After a valid waiver is obtained, however, the suspect bears the burden of showing he is revoking the waiver and clearly insisting upon his right to counsel prior to further interrogation. If he fails to clearly and unequivocally express his desire to have counsel present, then under Davis the interview may proceed without clarification. To the extent that we failed to make this distinction in Saylor, a pre-waiver scenario not unlike the case before us, we modify the extent of its application.

Analysis

In applying these constitutional standards, we must first determine whether the statements that the Defendant made to Smyrna police on February 9, 2007 qualified as an unequivocal invocation of the right to counsel. In this instance, the Defendant's references to counsel were made prior to any waiver of his Miranda rights. Thus, any of his subsequent statements must be suppressed under the Edwards ruling if: (1) the invocation of his right to counsel was clear and unequivocal based upon the objective standard set forth in Davis and our own decision in Saylor or (2) he made an ambiguous request for counsel but the questions the police officers asked prior to the signing of the Miranda waiver form went beyond merely clarifying whether the Defendant intended to invoke his Fifth Amendment right to counsel. The State bears the burden of proof.

Of the several comments pertaining to counsel made by the Defendant after he was informed of his Miranda rights, but before he executed the waiver,

perhaps the most assertive appear in the following exchange:

> SPEARMAN: . . . [D]o you want a lawyer present right now? Just yes or no.
> THE DEFENDANT: I could–if I could afford one.
> HODGES: It's not up to whether you afford one or not–
> THE DEFENDANT: Oh, I can get one rather or not?
> HODGES: Yes, sir.
> THE DEFENDANT: And he can come today?
> SPEARMAN: If you got one that you can call.
> THE DEFENDANT: Can I–my phone, my phone is right there in that little envelope–can you go get it for me?
> HODGES: Well, I tell you what–we've got a phone that you can use if you want.
> THE DEFENDANT: I mean, the number's in my cell phone, the lawyer.

(Emphasis added.) This exchange and the circumstances immediately preceding it serve as the basis for our analysis. When considering the question of ambiguity in the assertion of the right to counsel, "an accused's *postrequest* responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself." Smith, 469 U.S. at 100. Rather, "[w]here nothing about the request for counsel or the circumstances

leading up to the request would render it ambiguous, all questioning must cease." Id. at 98.

The trial court found that the Defendant had unequivocally asserted his right to counsel when he asked the officers to retrieve his cell phone, which apparently contained the cell phone number of a pre-paid legal services provider. The Court of Criminal Appeals held otherwise, concluding that "[v]iewing the interview as a whole, no reasonable officer in this situation would understand [the Defendant]'s statements regarding his cell phone to be an unconditional and unequivocal request for counsel." Turner, 2009 WL 426260, at *8. While this case presents a close issue, we agree with the Court of Criminal Appeals. When taken in context of the conversation between the officers and the Defendant preceding the request for the cell phone, see Smith, 469 U.S. at 100, we believe that it was reasonable for the interrogating officers to further attempt to clarify the nature of his inquiry, rather than terminate the interview. In making this determination, we have viewed the video recording, made observations of the officers' demeanor, and carefully considered the nature and tone of their conversations with the Defendant.

We disagree with the assertion by the Defendant that the custodial interrogation is "indistinguishable" from that in State v. Tidwell, 775 S.W.2d 379 (Tenn. Crim. App. 1989). Tidwell was arrested under suspicion of engaging in unlawful sexual contact. Id. at 383. The transcript of the interrogation established that Tidwell, during the initial stages of the interview, remarked "I'd like to call a lawyer before I discuss that." Id. This was

followed by a variety other statements which, even if less certain, indicated Tidwell's desire to have an attorney present. See id. at 384 ("I can't get a lawyer and tell you to[o]?"; "I'm going to tell you, but . . . don't I need some guidance in what I'm going to say[?]"; "Can't I have a lawyer here today and tell you[?]"). Our Court of Criminal Appeals held that the statement "I'd like to call a lawyer before I discuss that" was an unequivocal assertion of Tidwell's right to counsel, which was supported by his subsequent questions to the officers. Id. at 387. It was, therefore, improper for the officers to further comment, to forge ahead with the interrogation, and to "ma[k]e every effort to coax [Tidwell] into making a statement."[11] Id. (quoting remarks by the officers, including "[a] lawyer won't give a tinker's damn about these children").

The case at bar is easily distinguished from Tidwell. The Defendant's request for his cell phone is not a clear assertion of the right to counsel like the statement "I'd like to call a lawyer before I discuss that." Moreover, the officers continued to aggressively interrogate Tidwell regarding his alleged criminal activities after he made his request

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[11] The court went on to state that "[a]ssuming *arguendo* that [Tidwell]'s request in the case *sub judice* was equivocal, the interrogation following the equivocal request should have been strictly limited to a clarification of whether the defendant was in fact invoking his right to have counsel present during interrogation." Id. at 387. This was the standard for all custodial interrogations in Tennessee prior to Davis and Saylor. It remains the standard for interactions between police and the accused prior to waiver of the Miranda rights.

for counsel. Detective Hodges and Lieutenant Spearman, by comparison, were courteous to the Defendant and limited their inquiry to clarification of the Defendant's references to an attorney.

The Defendant cites several decisions in which courts have held that statements similar to the ones he made here qualified as unequivocal requests for counsel. We believe that the Defendant's request for his cell phone lacks the clarity of the assertions of the right to counsel in Robinson v. Borg, 918 F.2d 1387, 1389 (9th Cir. 1990) ("I have to get me a good lawyer, man. Can I make a phone call?"), and United States v. Taft, 769 F. Supp. 1295, 1302-03 (D. Vt. 1991) ("[W]hen we get down to the office, can we call–use your phone to call an attorney?"). Furthermore, the Defendant's claim that these cases "appear to be the entire body of caselaw on the issue of requesting a telephone and whether such request constitutes a request for counsel" is simply inaccurate. Numerous courts have found similar statements to be equivocal invocations of the right to counsel. See, e.g., Dormire v. Wilkinson, 249 F.3d 801, 805 (8th Cir. 2001); Ford v. Hall, 546 F.3d 1326, 1339 (11th Cir. 2008); Reed v. State, 227 S.W.3d 111, 116 (Tex. Crim. App. 2006).

In reaching our conclusion, we have also considered a statement that the Defendant made in response to Lieutenant Spearman's inquiry as to whether he wanted a lawyer present. Because the response "I could–if I could afford one" assumes a condition that is not an obstacle to a criminal defendant's entitlement to counsel, this reference more closely approaches an unequivocal request for counsel than the Defendant's request for his cell

phone. Ultimately, however, we are persuaded by the fact that when given the opportunity by Lieutenant Spearman to unambiguously assert his right to have an attorney present ("You know, do you want a lawyer present right now? Just yes or no."), the Defendant qualified his response by stating "if I could afford one." The implication that the Defendant might desire counsel if he could afford one was not, in context, a clear invocation of the right to counsel. We believe that our conclusion is in line with a majority of jurisdictions who have considered the effects of similar statements.[12]

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[12] See, e.g., Lord v. Duckworth, 29 F.3d 1216, 1220-21 (7th Cir. 1994) (holding, in light of Davis, that defendant's statement "I can't afford a lawyer but is there anyway I can get one?" "lacked the clear implication of a present desire to consult with counsel" and "was ambiguous, at best"); Braboy v. State, 745 A.2d 471, 478-79 (Md. Ct. Spec. App. 2000) (determining that defendant's statement, while being read his Miranda rights, that "I want a lawyer but I can't afford a lawyer" was not an unequivocal request for counsel); People v. Granderson, 538 N.W.2d 471, 473 (Mich. Ct. App. 1995) (holding that defendant's response, after being told that the state would provide him an attorney if he wanted one, of "Yeah, I'm–I'm ah need that 'cause I can't afford none," did not reflect a present desire for counsel at all, much less an unequivocal one); State v. Linnik, No. CA2004-06-015, 2006 WL 456792, at *4-5 (Ohio Ct. App. Feb. 27, 2006) (holding that defendant's response "I can't–I can't afford it" when informed appellant that an attorney would be provided for him if he could not afford one did not, without further explanation, "amount to a clear, unambiguous, or unequivocal invocation of the right to counsel"); but see United States v. Alamilla-Hernandez, 654 F. Supp. 2d 1004, 1010 (D. Neb. 2009) ("[T]he defendant made a clear and unambiguous request for a lawyer when he responded, 'I cannot afford an attorney' to the officer's statement that if he could not afford an attorney, one would be appointed for him.").

Our opinion today should not be read to adopt an inflexible rule that a request to call an attorney or a statement regarding one's ability to afford counsel can never be deemed an unequivocal request for counsel. Rather, under these particular circumstances, the Smyrna police officers acted reasonably by interpreting the Defendant's remarks to be less than a clear and unambiguous invocation of his right to counsel. Importantly, the police officers, as required, limited their inquiry to attempting to clarify the Defendant's intentions until they obtained a valid waiver.[13]

Conclusion

Because the Defendant did not unequivocally invoke his right to counsel under the Fifth Amendment to the United States Constitution and article I, section 9 of the Tennessee Constitution until he said "[g]et me a lawyer" nearly an hour-and-a-half into the police questioning, the trial court should not have granted the motion to suppress any of the statements made prior to that point. Further, when the Defendant inquired about his right to counsel as he was being informed of his Miranda rights, the Smyrna police officers properly limited the scope of their interrogation to clarifying questions until the Defendant signed the Miranda waiver form. The judgment of the Court of Criminal

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[13] For example, when the Defendant made the statement "if I could afford one," Detective Hodges immediately explained that "[i]t's not up to whether you [can] afford one or not." Further, when the Defendant asked for his cell phone, the officers asked if he already had an attorney whom he intended to call.

Appeals is, therefore, affirmed. Costs of this appeal are assessed to the Defendant, Thomas L. Turner, II, for which execution may issue if necessary.

/s/Gary R. Wade
GARY R. WADE, JUSTICE

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE AT NASHVILLE

August 20, 2008 Session

STATE OF TENNESSEE v. THOMAS LEWIS TURNER, II

Interlocutory Appeal from the Circuit Court for Rutherford County
No. F-60192B Don R. Ash, Judge

No. M2008-00482-CCA-R9-CO - Filed February 20, 2009

The defendant, Thomas Lewis Turner, II (hereinafter "Turner"), was indicted for murder in the perpetration of a robbery, premeditated murder, especially aggravated robbery, conspiracy to commit robbery, possession of ecstasy, and possession of marijuana. The trial court granted Turner's motion to suppress his statement to police. Pursuant to Rule 9 of the Tennessee Rules of Appellate Procedure, the State was granted this interlocutory appeal challenging the trial court's suppression of the statement made by Turner during a custodial interrogation. Because Turner did not make an unequivocal request for an attorney during the interrogation, the order of suppression is reversed, and the case is remanded for further proceedings consistent with this opinion.

Tenn. R. App. P. 9 Interlocutory Appeal; Judgment of the Circuit Court Reversed

CAMILLE R. MCMULLEN, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and JAMES CURWOOD WITT, JR., J., joined.

Kerry Knox, Murfreesboro, Tennessee, for the appellee, Thomas Lewis Turner, II.

Robert E. Cooper, Jr., Attorney General and Reporter; Mark A. Fulks, Assistant Attorney General; William C. Whiteshell, Jr., District Attorney General; and J. Paul Newman, Assistant Attorney General, for the appellant, State of Tennessee.

OPINION

Facts. On February 9, 2007, at approximately 9:00 a.m., Turner and a co-defendant were arrested by the Smyrna Police Department for a robbery and murder that took place around midnight the night before. Initially, two officers, with guns drawn, took Turner and the co-defendant into custody. Once the two men were in custody, a total of five to six officers were present at the scene. Turner and the co-defendant were held at the arrest scene for approximately fifteen to twenty minutes before being transported to the police station. At 9:40 a.m., the co-defendant waived his Miranda rights and confessed to his and Turner's involvement in the crimes. Following the co-defendant's confession, Det. Kevin Hodges and Lt. Todd Spearman of the Smyrna Police Department interrogated Turner regarding the robbery and murder. The video, which was an exhibit to the 2 suppression hearing, reveals that Turner, Det. Hodges, and Lt. Spearman were the only people present during the interrogation, which took place in

a small room containing a small table and four chairs, one of which was folded against the wall.

Detective Hodges testified that Turner spent approximately three to four hours in a holding cell before being brought to the interrogation room. He believed that Turner was sleeping in his holding cell prior to being interviewed but was not certain because he was not the one who retrieved Turner from his cell. Detective Hodges stated that he and Lt. Spearman were the officers who interviewed Turner, and he acknowledged that he and Lt. Spearman had a larger build than Turner.

During the interrogation, the officers sat a little farther than arm's reach of Turner. Detective Hodges said that Lt. Spearman was not carrying a firearm and that he did not believe he carried a firearm during the interview, although even if he had, it would have been hidden by the wind shirt he was wearing. Detective Hodges said that he did not believe he told Turner that he was a suspect in a murder case during the interview. Turner did not appear lethargic at the time of the interview, and he did not recall Turner saying anything about smoking marijuana the day before the interview.

During the interview, Turner told Lt. Spearman that he attended the twelfth grade. Detective Hodges told Turner that "if he had any questions about any of his rights that [he and Lt. Spearman] would explain those to him." When Turner asked if he could stop answering our questions at any time, Det. Hodges told him, "[Y]ep, that is one of your rights and you can do that." Detective Hodges said that Turner appeared "fine" during the interview. Turner's first statement to Lt.

Spearman during the interview was, "Are you my lawyer?" Lieutenant Spearman responded, "No. I'm a police officer." At the time, Lt. Spearman was wearing a shirt with "Smyrna Police" written on the front. Shortly thereafter, Turner asked, "How quick [sic] will my lawyer get here?" Detective Hodges stated that he and Lt. Spearman questioned Turner about whether he had an attorney at the beginning of the interview:

> We asked him if he had an attorney. He said yes. Said okay. And then he turned around and said, "No. Actually I've got prepaid legal service." Went into some banter about probation or something else. And we said, "Hey, if you want an attorney, we can get you one. Or you can talk to us."

Detective Hodges explained that they continued to talk to Turner because "he said he really didn't have an attorney. It was prepaid legal service is [sic] what he had." Turner then said something about his cell phone, which they refused to give to him, and Det. Hodges told him that he could use their telephone. Detective Hodges said that he did not understand Turner's "banter" to mean that he needed an attorney. Turner said something to him about having an attorney but not having met or seen him yet. Turner was held in custody three to four hours prior to his interview, and Det. Hodges did not know if Turner had been permitted to get his cell phone to call an attorney. He also told Turner something like if he did not start talking to them about what happened, then they were going to take the statement of his co-defendant. Detective Hodges

said that he was not aware of any statements made by Turner prior to this interview. He also said that he did not talk to Turner at all prior to the interview.

Turner signed a waiver of rights form on February 9, 2007, at 12:05 p.m. Detective Hodges stated that Turner waived his right to counsel prior to a formal interview regarding this case. Turner was able to understand what he was doing when he gave his statement, did not mention ingesting any drugs or alcohol, and did not appear to be under the influence when he gave his statement. Detective Hodges did not witness any coercive conduct or physical abuse and said that there was no yelling, screaming, or drawing of weapons by the officers during the interview. Detective Hodges said that Turner did not unequivocally and unconditionally request an attorney prior to giving his statement. Turner decided to give a statement to Det. Hodges and Lt. Spearman after he had asked about his rights.

Captain Spearman testified that he was a lieutenant and the chief of the detectives in February of 2007 when Turner was interviewed. He said that he sat close enough to Turner during the interview so that they could have a conversation and that the interview room was large enough for four people. Captain Spearman said that he informed Turner why he was there. He did not have a firearm on his person when he interviewed Turner. Turner did not appear to be lethargic or under the influence of any drugs during the interview, and he seemed to understand what he was doing when he made his statement, although he did not specifically ask Turner if he was under the influence of an intoxicant

at the time. He did not give Turner any drug tests and was not aware of anyone else in the police department giving him any drug tests. Turner did make an unequivocal request for an attorney at the end of the interview, and he and Det. Hodges abruptly stopped the interview. He did not recall Turner making an unequivocal request for an attorney prior to the time that they stopped the interview. Captain Spearman explained that he stops interviews once an individual makes an unequivocal request for an attorney and that if Turner mentioned anything about an attorney during the earlier stages of the interview, then it was not an unequivocal request for an attorney. He and Det. Hodges went over the Miranda rights waiver with Turner, and then Turner signed the waiver.

The video of the interview corroborates the above testimony and shows the officers advising Turner of his Miranda rights. Turner then requested his cell phone to call his lawyer. The officers declined to provide Turner with his cell phone but offered to allow Turner to use their telephone. Turner then told the officers he had prepaid legal services and did not actually have an attorney. In response, the officers told Turner they believed he was "telling [him] that [Turner] really [didn't] want to talk to [them] right now and [that Turner] would rather speak to an attorney." Turner replied, "I mean, I can talk 'cause I can tell you –." Following this exchange, Turner initialed and signed the admonition and waiver form and then explained his involvement in the robbery and murder for the next hour and twenty minutes without asking about an attorney again. At 1:24:36 p.m., as Det. Hodges was reviewing the facts given by Turner and Lt. Spearman was outside the

interview room, Turner said, "Y'all [sic] twisting the story now. Do I need to get a lawyer?" Approximately two minutes later, at 1:26:03 p.m., Turner stated, "Get me a lawyer. And I'm through. Get me a lawyer, and I'll tell the lawyer exactly everything that went down. I had nothing to do with it. I can't afford one. I need a lawyer. 'Cause this is getting out of hand." At that point, Det. Hodges immediately stopped questioning Turner.

On May 8, 2007, Turner was indicted for murder in the perpetration of a robbery, premeditated murder, especially aggravated robbery, conspiracy to commit robbery, possession of ecstasy, and possession of marijuana. On June 19, 2007, Turner filed a pre-trial motion to suppress his confession, asserting that he did not knowingly and voluntarily waive his right to counsel because of his lack of sleep, use of drugs, the delay in being interviewed, and the coercive tactics used by the Smyrna Police Department. On December 21, 2007, Turner filed an amended motion to suppress on the basis that he unequivocally requested counsel. On January 17, 2008, the trial court entered an order granting Turner's motion to suppress on the basis that he made an unequivocal request for counsel:

> After review of the interrogation video tape . . . the Court is of the opinion the Defendant did in fact make an unequivocal request for an attorney, at which time the police did not cease the questions until counsel could arrive. . . .
>
> . . . .

> In this case, the Defendant made various requests for an attorney. He stated:
> 1. "Are you my lawyer?"
> 2. "How quick will my lawyer get here?" at 12:08: on the tape
> 3. "Will my lawyer get here today?"at 12:09: on the tape.
> 4. "Can I get one with no money?" at 12:10:50 on the tape.
> 5. "Defendant asked for his cell phone to retrieve his lawyer's phone number." at 12:12 on tape.
> 6. "Do I need to get a lawyer?" at 1:24:40 on the tape.
> 7. "Get me a lawyer" at 1:26:00 on the tape.

It is this Court's belief not all of the statements are unequivocal requests for an attorney. For instance, questions regarding whether the detective is his attorney, how quick it will take his attorney to arrive, whether his attorney will arrive today, whether he can get an attorney without money, and whether he needs an attorney are all ambiguous requests. However, this Court is of the

> belief when the Defendant asked the detectives to retrieve his cell phone so he could call his attorney, he was making an unequivocal request for an attorney. This statement, coupled with the entire surrounding circumstances and prior [alluding] to an attorney support this
> Court's finding the Defendant's statement to the Smyrna Police should be suppressed to the extent the Detectives continued questioning the Defendant after he asked to retrieve his attorney's phone number.

Analysis. The State, as appellant, argues that the record preponderates against the trial court's decision that Turner unequivocally invoked his right to counsel prior to giving his statement. First, the State contends that the suppression order should be reversed because "the trial court reviewed the defendant's many equivocations and concluded that his request for his mobile telephone, the totality of the circumstances, and the defendant's nebulous references to an attorney constituted an unequivocal request." Second, the State asserts that Turner did not unequivocally request an attorney until approximately one hour into the interview, when the interview was abruptly stopped. Third, the State contends that Turner's request for his cell phone cannot be interpreted as an objective request for counsel and that the trial court is prohibited from considering his subjective intent regarding this request.

In response, Turner contends that the trial court properly granted his motion to suppress because he made an unequivocal request for an attorney. First, he argues that the trial court must consider the "totality of the circumstances" in order to determine whether he knowingly and voluntarily waived his right to counsel before giving his statement to the officers. Second, he claims that the record shows that his statements to Det. Hodges and Lt. Spearman focus on the issue of an attorney and conclude with his request for "his cellular telephone for the purpose of contacting an attorney with whom Turner has had a prior relationship." Third, Turner cites case law from other jurisdictions showing that the request to use a telephone to call a lawyer is considered an unequivocal request for counsel. Fourth, Turner argues the officers had a duty to stop the interview when he asked for his cell phone with his attorney's number and confirmed that he had an attorney. Fifth, Turner contends that this court must consider his very slight involvement with law enforcement and his unfamiliarity with police and interrogation procedures when determining whether to affirm or reverse the trial court's order of suppression.

The courts of this state have concluded that "a trial court's determination at a suppression hearing is presumptively correct on appeal." State v. Saylor, 117 S.W.3d 239, 244 (Tenn. 2003)(citing State v. Harbison, 704 S.W.2d 314, 318 (Tenn. 1986)). However, if the record on appeal preponderates against the trial court's determination, then the presumption of correctness may be overcome. Harbison, 704 S.W.2d at 318 (citing Mitchell v. State, 458 S.W.2d 630, 632 (Tenn. Crim. App. 1970)). The

Tennessee Supreme Court explained this standard in State v. Odom:

> Questions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact. The party prevailing in the trial court is entitled to the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from that evidence. So long as the greater weight of the evidence supports the trial court's findings, those findings shall be upheld.

State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996).

This court's analysis must begin with the United States Constitution and the Tennessee Constitution. The Fifth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, states that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." Similarly, the Tennessee Constitution states "that in all criminal prosecutions, the accused . . . shall not be compelled to give evidence against himself." Tenn. Const. art. I, § 9. "Encompassed within both of these constitutional provisions is the right to counsel, which is applicable whenever a suspect requests that counsel be present

during police-initiated custodial interrogation."[14] Saylor, 117 S.W.3d at 244. In Miranda v. Arizona, the United States Supreme Court did not outline the requirements to invoke a Fifth Amendment right to counsel; instead, the Court generally stated that the right was invoked when an individual "indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking . . . ." Miranda v. Arizona, 384 U.S. 436, 444-45, 86 S. Ct 1602, 1612 (1966). However, eight years later in Davis v. United States, the United States Supreme Court adopted a significantly narrower standard for invoking a right to counsel under the Fifth Amendment:

> The applicability of the "'rigid' prophylactic rule" of Edwards[15] requires courts to "determine whether the accused actually invoked his right to counsel." To avoid difficulties of proof and to

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[14] However, in Tennessee, the Sixth Amendment "right 1 to counsel attaches when adversary judicial proceedings are initiated." State v. Mitchell, 593 S.W.2d 280, 286 (Tenn. 1980). "Initiation is marked by formal charge, which we construe to be an arrest warrant, or at the time of the preliminary hearing in those rare cases where a preliminary hearing is not preceded by an arrest warrant, or by indictment or presentment when the charge is initiated by the Grand Jury." Id. (footnote omitted). Because Turner's charges were initiated by the Grand Jury through an indictment, only the Fifth Amendment right to counsel is applicable to this case.

[15] Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880 (1981).

provide guidance to officers conducting interrogations, this is an objective inquiry. Invocation of the Miranda right to counsel "requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney." But if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel, our precedents do not require the cessation of questioning.

Rather, the suspect must unambiguously request counsel. As we have observed, "a statement either is such an assertion of the right to counsel or it is not." Although a suspect need not "speak with the discrimination of an Oxford don," he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. If the statement fails to meet the requisite level of clarity, Edwards does not require that the officers stop questioning the suspect.

Davis v. United States, 512 U.S. 452, 458-59, 114 S. Ct. 2350, 2355 (1994) (internal citations omitted).

Whenever a suspect invokes his right to counsel, law enforcement must stop questioning until the suspect's attorney is present. Saylor, 117 S.W.3d at 244 (citing Miranda, 384 U.S. at 444-45, 86 S. Ct. at 1612; Edwards, 451 U.S. at 484-85, 101 S. Ct. at 1885; State v. Stephenson, 878 S.W.2d 7 530, 548 (Tenn. 1994)). An invocation of the right to counsel may be made "in any manner and at any stage of the process." Miranda, 384 U.S. at 444-45, 86 S. Ct. at 1612. The United States Supreme Court has stated that "a broad, rather than a narrow, interpretation to a defendant's request for counsel" is proper. Connecticut v. Barrett, 479 U.S. 523, 529, 107 S. Ct. 828, 832 (1987) (citing Michigan v. Jackson, 475 U.S. 625, 633, 106 S. Ct. 1404 (1986)). Once the suspect invokes his right to counsel, "any subsequent statement made by a defendant as a result of police-initiated interrogation must be suppressed." State v. Carrie Ann Brewster and William Justin Brewster, No. E2004-00533-CCA-R3-CD, 2005 WL 762604, at *6 (Tenn. Crim. App., at Knoxville, Apr. 5, 2005) (citing Edwards, 451 U.S. at 487, 101 S. Ct. at 1886). Once the right to counsel attaches, only the suspect can initiate further communication with law enforcement. Edwards, 451 U.S. at 484-85, 101 S. Ct. at 1885.

Whether the suspect made an equivocal or unequivocal request for counsel is a question of fact. State v. Farmer, 927 S.W.2d 582, 594 (Tenn. Crim. App. 1996). In Davis, the United States Supreme Court stated that although it is a good policy for law enforcement to clarify whether a suspect has actually

asked for an attorney when the suspect's request is ambiguous, it "decline[d] to adopt a rule requiring officers to ask clarifying questions." Davis, 512 U.S. at 461, 114 S. Ct. at 2356. The Court explained, "If the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him." Id. at 461-62, 114 S. Ct. at 2356.

In the 2003 decision of State v. Saylor, the Tennessee Supreme Court clarified the standard for invoking the right to counsel:

> [W]e hold today what we implicitly held in Huddleston: The standard for a valid invocation of the right to counsel is the same under both Article I, Section 9 [of the Tennessee Constitution] and the Fifth Amendment. The accused "must articulate his desire to have counsel present sufficiently clearly that a reasonable [police] officer . . . would understand the statement to be a request for an attorney." Huddleston, 924 S.W.2d at 670 (quoting Davis, 512 U.S. at 459, 114 S. Ct. [at 2355]). If the suspect fails to make such an unambiguous statement, police may continue to question him without clarifying any equivocal requests for counsel. Id. We find the following observation in Davis persuasive:
>
> > The Edwards rule–questioning must cease if

> the suspect asks for a lawyer–provides a bright line that can be applied by officers in the real world of investigation and interrogation without unduly hampering the gathering of information. But if we were to require questioning to cease if a suspect makes a statement that might be a request for an attorney, this clarity and ease of application would be lost. Police officers would be forced to make difficult judgment calls about whether the suspect in fact wants a lawyer even though he [has not] said so, with the threat of suppression if they guess wrong. Id., 512 U.S. at 461, 114 S. Ct. 2350 (emphasis in original); see also State v. Owen, 696 So.2d 715, 719 (Fla.1997) (discussing Davis).

Saylor, 117 S.W.3d at 246 (internal footnote omitted). Here, the State contends that Turner's statements, which culminated with his request for his cell phone, do not constitute an unequivocal request for an

attorney. We agree. We conclude that the record preponderates against the trial court's decision to suppress Turner's statement. Turner's ambiguous references to an attorney do not constitute an unequivocal request for an attorney. The central issue for our review in this case, as noted by both parties at oral argument, is whether Turner invoked his right to counsel when he requested to use his cell phone. The video of the interview revealed the following exchange:

> Lieutenant Spearman: Let me – I will make this a little more simple for you. We wish to ask you questions. We wish to ask you questions about some stuff that happened. According to this, you have a right to have a lawyer present, okay. That's your option. You know, do you want a lawyer present right now? Just yes or no.
>
> Turner: If I could afford one?
>
> Detective Hodges: It's not up to whether you can afford one or not.
>
> Turner: Oh, I can get one rather or not?
>
> Detective Hodges: Yes, sir.
>
> Turner: And he can come today?
>
> Lieutenant Spearman: If you got one that you can call.

Turner: Can I? My phone – my phone is right there in that little envelope. Can you go get it for me?
Detective Hodges: Okay, well, I'll tell you what. If – we've got a phone that you can use if you want.

Turner: I mean, the number is in my cell phone. My lawyer.

Detective Hodges: So you already have an attorney then?

Turner: Yeah.

Lieutenant Spearman: Who?

Turner: Uh (eleven second pause when Turner takes a sip of his soda). Well, actually, I never met him. But it's through prepaid legal. My lawyer – I never met him. I – I needed him for my court case, but it turns out I didn't have the money to pay him so I ended up having to take the charge or whatever.

Detective Hodges: Okay, basically this – what – what you're telling me is that you really don't want to talk to us right now and you would rather speak to an attorney.

Turner: I mean, I can talk 'cause I can tell you –

> Detective Hodges: Well, I don't want to force anything you don't want to do, okay. I am not here to do that.
>
> Turner: (inaudible)
>
> Detective Hodges: Well, I mean – it's one of them two-way streets. Either you want to talk to me and we will sit down and talk or you don't.
>
> Lieutenant Spearman: Or, you want an attorney. It's that simple.
>
> Detective Hodges: It's very that – that simple.
>
> Turner: Alright, I'll talk to you.

Following this exchange, Turner talked to Det. Hodges and Lt. Spearman about his involvement in the case and did not mention the issue of an attorney again until approximately an hour and twenty minutes into the interview. Under the circumstances in this particular case, we decline to conclude that the aforementioned excerpt from Turner's interview constituted an unequivocal request for an attorney. Viewing the interview as a whole, no reasonable officer in this situation would understand Turner's statements regarding his cell phone to be an unconditional and unequivocal request for counsel. Therefore, the officers were under no obligation to stop asking Turner questions. In fact, the officers in this case went above and beyond what is required by Tennessee law when they attempted to clarify

whether Turner was actually invoking his Fifth Amendment right to counsel. Moreover, immediately after this equivocal request for counsel, Turner made the comment, "I mean, I can talk." Then Det. Hodges and Lt. Spearman attempted to clarify his request for counsel a second time, and Turner quickly responded, "Alright, I'll talk to you."

Furthermore, the record indicates that Turner intended to talk to the officers without an attorney. The video of the interview makes it apparent that Turner wanted to have an opportunity to convince the detectives that he was innocent. When it became obvious that he was not going to convince them of his innocence, Turner quickly and unequivocally requested counsel. The record shows that in his initial discussion with Det. Hodges and Lt. Spearman, he understood that he could have an attorney appointed, regardless of his ability to pay. When he finally and unequivocally invoked his right to counsel, he clearly stated, "Get me a lawyer, and I'll tell the lawyer exactly everything that went down. I had nothing to do with it. I can't afford one."

Turner cites one unpublished Tennessee case, State v. Ernest Jay Walker, that predates the Tennessee Supreme Court's decision in Saylor by ten years. State v. Ernest Jay Walker, No. 03C01-9110-CR-00346, 1993 WL 44195, at *1 (Tenn. Crim. App., at Knoxville, Feb. 22, 1993). In Walker, the defendant did not want to discuss the murder of the victim during his first interview with police. Id. at *1. At that point, an officer tried to convince him to talk about the crime anyway. Id. at *1-2. Then the officer told the defendant that his co-defendant had hired an attorney and offered to call that attorney for

him, which he declined. Id. at *2. At the conclusion of the first interview, the defendant told the officer that he would talk to the co-defendant's attorney at another time to seek advice. Id. Between the first interview and the second interview, both the defendant and the officer who first interviewed him had separate conversations with the co-defendant's attorney, wherein the attorney told both that he had a conflict of interest. Id. At the second interview, the defendant told the officer that he knew his co-defendant's attorney could not represent him. Id. Then the officer asked if there was another attorney he wanted to call, and the defendant said that there was not. Id. During this second interview, the defendant made several inculpatory statements. Id. at *3. The trial court suppressed the defendant's statement because the conversations between the defendant and the attorney and between the officer and the attorney constituted an invocation of the defendant's right to counsel. Id. at *4. In affirming the trial court's decision to suppress in Walker, this court reasoned:

> [T]he trial court made no finding regarding the defendant's waiver of his right to remain silent. It, instead, found that the defendant invoked his right to counsel before the police-initiated second meeting and that the police were barred from initiating further contact with the defendant without counsel present, even if the defendant had occasion to contact counsel before the second meeting. We hold that the record supports the trial court's findings and

> that the conclusions reached were proper.

Id. at *6. Ultimately, the court concluded that Walker had invoked his right to counsel:

By the defendant's refusal to discuss the case in the first meeting and his statement that he would be talking with Mr. Tollison to seek some advice, the police were advised of the defendant's desire for the assistance of counsel. Further, when the police verified that the defendant had talked to Mr. Tollison, they were aware of the defendant's active attempt to obtain the assistance of counsel, but that Mr. Tollison was unable to represent the defendant. We view these circumstances as reflecting that the defendant invoked his right to counsel which brought into play the prophylactic rule of Edwards and required the police to refrain from initiating further contact with the defendant directed toward obtaining a statement until counsel was obtained and present.

Id. at *7. Clearly, in Walker, the accused invoked his right to remain silent, indicated he was going to talk to an attorney, and then did, in fact, talk to an attorney. These facts are in marked contrast to the instant case, in which Turner never invoked his right to remain silent and never used the resources available to him to contact an attorney or have an attorney appointed. The officers gave Turner an opportunity to clarify whether he was, in fact, requesting an attorney no less than eight times during the interview, and Turner failed to invoke his right to counsel each of these times. Accordingly, we conclude that Walker does not shed light on the case at hand.

Turner also cites several cases from other jurisdictions for the proposition that the request to use a telephone to call a lawyer is considered a unequivocal request for counsel. Obviously, none of these cases have precedential value because they are not from Tennessee. Additionally, we note that the Tennessee Supreme Court has not adopted the view that a request for a telephone to contact an attorney necessarily constitutes an invocation of the right to counsel. Finally, we reiterate that the rule in Tennessee is that "the accused 'must articulate his desire to have counsel present sufficiently clearly that a reasonable [police] officer would understand the statement to be a request for an attorney.'" Saylor, 117 S.W.3d at 246 (citations omitted). Accordingly, based on the current law in Tennessee, we conclude that Turner's request for his cell phone to contact an attorney does not constitute an unequivocal request for counsel.

However, even if we consider the cases cited by Turner from other jurisdictions, we note that none contain a fact pattern similar to the one in the instant case. In perhaps the strongest of his cited cases, United States v. Taft, an officer told the two accused individuals, "[Y]ou may want to speak with an attorney to discuss this matter first," and one accused stated, "Yeah, let's do that." Later, the same accused asked, "Well, when we get down to the office, can we call–use your phone to call an attorney?" United States v. Taft, 769 F. Supp. 1295, 1301 (D. Vt. 1991). In Taft, the issue was whether the request to call an attorney on the telephone at the station constituted an unequivocal request for counsel. Id. at 1303. Here, Turner was denied the use of his cell phone but was given the option to use the telephone

at the police station, which he declined. The State argues, and we agree, that Det. Hodges and Lt. Spearman had ample reasons not to allow Turner to use his cell phone, including the possibility that Turner could destroy evidence on his cell phone or attempt to communicate with other individuals involved in the crimes. Therefore, on this basis, the instant case can easily be distinguished from the Taft case. In the next case cited by Turner, Silva v. Estelle, the defendant was absolutely denied the opportunity to use the telephone to call his attorney. Silva v. Estelle, 672 F.2d 457, 458-59 (5th Cir. 1982). In Turner's third case, Robinson v. Borg, the accused asked for a telephone several times before being allowed to call his mother, during which he failed to mention the need for an attorney. Robinson v. Borg, 918 F.2d 1387, 1389-90 (9th Cir. 1990). Here, in contrast to Silva and Robinson, the officers made a telephone readily available to Turner, but he refused to use it. When Turner was given several opportunities to talk to an attorney, he determined that he would talk to the officers instead. In the fourth case cited by Turner, Kirby v. Senkowski, the accused asked to call an attorney and had, in fact, already spoken with his lawyer prior to giving his statements, which was deemed by the court to be an invocation of the right to counsel. Kirby v. Senkowski, 141 F. Supp. 2d 383, 397 (S.D.N.Y. 2001). In Turner's fifth case, United States v. Porter, the accused made a telephone call to information to get the phone number for his attorney and a telephone call to his attorney's office where he left a message for his attorney. United States v. Porter, 764 F.2d 1, 6-7 (1st Cir. 1985). The court in Porter found that the accused's attempt to call his lawyer was an invocation of his right to counsel. Id. at 6. In contrast

to Kirby and Porter, Turner never actually contacted an attorney at all, even though he was given the opportunity. Aside from the fact that these five cases have no precedential value, they also substantially differ from the facts of this case. Accordingly, we do not find them persuasive.

Conclusion. We conclude that Turner did not make an unequivocal request for an attorney

/s/Camille R. McMullen
CAMILLE R. McMULLEN, JUDGE

IN THE CIRCUIT COURT FOR
RUTHERFORD COUNTY, TENNESEEE
AT MURFREESBORO
DIVISION III

STATE OF TENNESSEE	)	
VS.	)	No. F60192B
THOMAS TURNER	)	

ORDER

This cause came to be heard by way of pre-trial motions filed by the Defendant and the State. The Court heard such motions on Friday, January 11, 2009, and made the following determinations and findings, and hereby orders compliance therewith:

1. The Defendant filed a motion for a bill of particulars. At the hearing, the State advised the Court it had given the Defendant all information it had possession and knowledge of. The Court denies the Defendant's motion for a bill of particulars.

2. The Defendant filed a motion for discovery. The Court understands the State has complied

therewith, and hereby grants the motion, and orders compliance therewith.

3. The Defendant filed a motion for exclusion of evidence of prior bad acts, crimes, or wrongs by the Defendant. The State has not filed a motion for notice of intent to use such evidence at trial. If the State files such notice, a 404b hearing, pursuant to the Tennessee Rules of Evidence, will be held to determine admissibility. Therefore, the Defendant's motion is granted.

4. The Defendant moved this Court to exclude mention of handgun from statement. The Defendant's request is denied.

5. The Defendant filed a motion requesting the Court hold individual and sequestered voir dire. The Court denies this motion, but will allow the parties to submit a questionnaire to the Court for the jury. The parties are to submit their questionnaire to the Court for the jury. The parties are to submit their questionnaire for the prospective jurors to the Court several days prior to trial. The Court will allow individual and sequestered voir dire for some questions if such need arises during the voir dire process. Therefore, the motion is denied, with conditions.

6. The Defendant moved the Court to disallow exhibits into jury deliberations. The Court denies this motion.

7. The Defendant filed a motion to exclude evidence of gang material and gang involvement. The State stated to the Court it did not intend to use such

evidence at trial against the Defendant, therefore, the Court grants the Defendant's motion to exclude evidence linking the Defendant to gang activity.

8. The Defendant moved to the Court, in the alternative, if the Court denies its motion to suppress the Defendant's statements to Smyrna Police, to redact portions of the Defendant's statement in which the Defendant mimics a gargling sound the victim made after getting shot, but prior to her death. The Court reserved this issue pending its ruling on the suppression issues; however, because of the Court's ruling on the suppression issue, hereby denies this motion.

9. The Defendant moved the Court to suppress the Defendant's statements to Smyrna Police during his interrogation. The Defendant states his statement was not voluntary because of lack of sleep, intoxication, and coercion by the police. The Defendant also alleges his entire statement should be suppressed because the Smyrna Police denied him his right to an attorney after he unequivocally requested such and continued to interrogate him. The hearing on this suppression matter produced testimony of various Smyrna detectives who stated they did not observe the Defendant to be under any intoxicants. The detectives further stated the Defendant did not appear to be tired, nor did he appear agitated. The Defendant signed a waiver of his rights, to which he testified the detectives read to him. Evidence showed his education level is eleventh grade. The Defendant testified he had smoked marijuana several times the day before his arrest and was up until daylight the following morning. The Smyrna police arrested the Defendant approximately

9:00 a.m. The Court finds the testimony of the detectives was credible to show the Defendant was not coerced, was not too tired to make a voluntary statement, and was not under the influence at the time his statement was given to Smyrna Police. Therefore, this Court denies the motion to suppress the statements of the Defendant for reason of coercion, intoxication, or lack of sleep.

After review of the interrogation video tape, however, the Court is of the opinion the Defendant did in fact make an unequivocal request for an attorney, at which time the police did not cease the questioning until counsel could arrive. Both Tennessee and United States Constitutions guarantee the right to an attorney during custodial interrogations. U.S. Const. amend. V; Tenn. Const. art. I, §9. When a suspect makes an "unequivocal request for an attorney, all interrogation must cease." Edwards v. Arizona, 451 U.S. 477, 484-485 (1981); State v. Stephenson, 878 S.W.2d 530, 545 (Tenn. 1994). Only the initiation of statements by the Defendant can overcome the unequivocal request for an attorney. Edwards, 451 U.S. at 484. The threshold for an "unequivocal request" for an attorney is "at minimum, some statement that can reasonably be construed to be an expression of the desire for the assistance of an attorney." Davis v. United States, 512 U.S. 452, 459 (1994). Ambiguous requests for an attorney fall below such threshold. Id. at 461. The Court should decide whether the defendant's statement was sufficient so that "a reasonable [police] officer would understand the statement to be a request for an attorney." State v. Huddleston, 924 S.W.2d 666,670 (Tenn. 1996). If an ambiguous request is made, officers may continue to question

without limiting the questions towards clarifying the ambiguous request. Id. The decision of whether an unequivocal request for an attorney is made is a question of fact for the Court to decide. State v. Farmer, 927 S.W.2d 582, 594 (Tenn. Crim. App. 1996).

In State v. Saylor, the court stated the Defendant's remarks "I might need a lawyer because somebody might try to accuse me of something I didn't do; I guess it don't matter until I get a lawyer present; I'm supposed to have a lawyer present, don't I; I have to have a lawyer present, I reckon, You have to have a lawyer present before questioning" were ambiguous requests for an attorney. 117 S.W.3d 239, 243 (Tenn. 2003). In State versus Osbourne, the defendant was being read his rights from a waiver form, and after being read "I do not want an attorney at this time," the defendant responded "Yes, I do." 2007 LEXIS 516, No. M2005-02926-CCA-R3-CD, at 24 (Tenn. Crim. App. 2007). The officer continued reading the rights off of the waiver form and ultimately received the defendant's signature for waiver. Id. The Osbourne court found the statement "Yes, I do" and his waiver signature contradictory and ultimately held the defendant's "Yes, I do" comment equivocal. Id. The Court cautioned to police, confusion can be lessened regarding the ambiguity around attorney requests with further questioning by officers regarding clarification of such requests. Id.

In this case, the Defendant made various requests for an attorney. He stated:

1. "Are you my lawyer?" at 12:06:01 on the tape.

2. "How quick will my lawyer get here?" at 12:08: on the tape.

3. "Will my lawyer get here today?" at 12:09: on the tape.

4. "Can I get one with no money?" at 12:10:50 on the tape.

5. Defendant asked for his cell phone to retrieve his lawyer's phone number. At 12:12: on tape.

6. "Do I need to get a lawyer?" at 1:24:40 on the tape.

7. "Get me a lawyer" at 1:26:00 on the tape.

It is this Court's belief not all of the statements are unequivocal requests for an attorney. For instance, questions regarding whether the detective is his attorney, how quick it will take his attorney to arrive, whether his attorney will arrive today, whether he can get an attorney without money, and whether he needs an attorney are all ambiguous requests. However, this Court is of the belief when the Defendant asked the detectives to retrieve his cell phone so he could call his attorney, he was making an unequivocal request for an attorney. This statement, coupled with the entire surrounding circumstances and prior eluding to an attorney support this Court's finding the Defendant's

statement to the Smyrna Police should be suppressed to the extent the Detectives continued questioning the Defendant after he asked to retrieve his attorney's phone number.

WHEREFORE, Defendant's motion for a bill of particulars is denied, the motion for discovery is granted, motion in limine is granted as to prior bad acts and a hearing will be held if State files notice of intent to use prior bad acts, motion in limine as to the Defendant's statement regarding handgun is denied, motion for individual voir dire is denied except parties will be allowed to submit questionnaire for jury pool and issue may be readdressed at voir dire, motion for exhibits to be excluded from jury deliberations is denied, motion to exclude reference to gang-material is granted, motion in the alternative to redact statement is denied, and motion to suppress statements is granted.

IT IS SO ORDERED this 15 day of January, 2008.

/s/ Don R. Ash
Judge Don R. Ash
Circuit Court Judge

CERTIFICATE OF SERVICE

I hereby certify a copy of the foregoing has been sent via U.S. mail to the following parties on 15 day of January, 2008:

District Attorney's Office
320 West Main Street
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Kerry Knox
316 West Lytle Street
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Murfreesboro, TN 37130

/s/ Don R. Ash
Don R. Ash
Circuit Court Judge